Filed 9/23/14 In re P.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re P.M. II, a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. P.M., Defendant and Appellant.	E060721 (Super.Ct.No. INJ1300056) **OPINION**

APPEAL from the Superior Court of Riverside County. Lawrence P. Best, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded with directions.

Shobita Misra, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

P.M. (father) appeals from an order terminating parental rights to his teenage son, P.M. II (P.M.). The father's sole appellate contention is that the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related federal and state law. The Department of Public Social Services (Department) concedes the error. Accordingly, we will reverse.

Ordinarily, when we reverse due to failure to give ICWA notice, we direct the trial court to ensure that notice is given, to determine whether the minor is an Indian child, and, if it finds that the minor is not an Indian child, to reinstate the order terminating parental rights. Here, however, P.M. is going to turn 18 before our remittitur will issue in the ordinary course of events. Under these circumstances, it would be inappropriate to reinstate the order terminating parental rights. As we will discuss in more detail below, it may not even be necessary to give ICWA notice on remand.

I

FACTUAL AND PROCEDURAL BACKGROUND

P.M. lived with his mother and his maternal grandmother. At all relevant times, the father has been serving a term for bank robbery in federal prison in North Carolina; his expected release date is in February 2015.

P.M. has autism, cerebral palsy, and a developmental disability. The extent to which he is affected is not entirely clear. According to one social worker, he was "high functioning." However, another social worker reported that, even though he was in 11th

grade, he was just "learning how to go into a grocery store and purchase a small amount of items and give exact change."

In February 2013, when P.M. was 16, his mother tried to commit suicide. As a result, the Department of Public Social Services (Department) detained P.M. and filed a dependency petition concerning him. He was placed with the maternal grandmother.

The mother had a history of alcohol and marijuana abuse. She was currently facing charges of possession of an opium pipe. She admitted having recently used methamphetamine.

In April 2013, at the jurisdictional/dispositional hearing, the juvenile court found jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)) and failure to support (*id.*, § 300, subd. (g).) It ordered reunification services for the mother, but it denied them to the father.

On October 2013, at the six-month review hearing, the mother waived further reunification services so that P.M. could be adopted by the maternal grandmother. The juvenile court terminated reunification services and set a section 366.26 hearing.

In February 2014, at the section 366.26 hearing, the juvenile court terminated parental rights. At that point, P.M. was 17.

II

ICWA

The father contends the juvenile court failed to comply with the notice requirements of ICWA and related federal and state law.

A. *Additional Factual and Procedural Background.*

When first contacted, the father, the mother, and the maternal grandmother all denied any Indian ancestry. However, the mother filed a "Parental Notification of Indian Status" form (ICWA-020) stating, "I may have Indian ancestry," but adding that she was "[u]nsure" of the name of the tribe.

The Department served ICWA notice on the Pala Band of Mission Indians (Pala Band)[1] and on the BIA. The Pala Band replied that it had no record that P.M. was an Indian child. At the six-month review hearing, the juvenile court found that "ICWA does not apply . . . ."

The adoption assessment, however, filed in anticipation of the section 366.26 hearing, stated, "The mother of the [maternal grandmother] . . . was a registered member of the Cherokee tribe but left the reservation and lost her membership."

No further ICWA notice was served, and the juvenile court made no further ICWA findings.

B. *Analysis.*

"In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt

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[1] According to a subsequent social worker's report, the maternal grandmother had grown up on or near the Pala reservation.

requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) "If the identity or location of the tribe cannot be determined, notice must be sent to the Bureau of Indian Affairs (BIA). [Citation.] No hearing on . . . termination of parental rights may be held until at least 10 days after the tribe or BIA has received notice. [Citation.]" (*In re W.B.* (2012) 55 Cal.4th 30, 48.)

"[E]vidence of Indian ancestry is sufficient 'reason to know' a child is an Indian child so as to trigger the notice requirement. [Citations.]" (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231 [Fourth Dist., Div. Two]; see also Welf. & Inst. Code, § 224.3, subd. (b).)

"The court [and] county welfare department . . . have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings . . . ." (Welf. & Inst. Code, § 224.3, subd. (a).) "'"Notice is mandatory, regardless of how late in the proceedings a child's possible Indian heritage is uncovered. [Citations.]" [Citation.]' [Citation.]" (*In re Suzanna L.*, *supra*, 104 Cal.App.4th at p. 231.)

Here, the adoption assessment indicated, for the first time, that P.M. had Cherokee ancestry. That gave the trial court and the Department reason to know that P.M. was an Indian child. Hence, it gave them a duty to give notice to the three federally recognized

Cherokee tribes. (See Cal. Dept. of Social Services, *Federally-Recognized Tribes: ICWA Contacts for Noticing Purposes* (2014) at p. 5.)[2] They did not do so.

While notice had already been given to the BIA, this suffices if and only if the identity of the relevant tribe cannot be determined. When, as here, the child's potential affiliation can be narrowed down to two or three tribes, notice must be given to each of those tribes. (*In re C.B.* (2010) 190 Cal.App.4th 102, 145-146; *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1202; *In re J.T.* (2007) 154 Cal.App.4th 986, 992-994.)

The Department concedes that due notice was not given. Ordinarily, the appropriate disposition would be to reverse and remand with directions to give notice pursuant to ICWA; if, after notice is given, the juvenile court finds that ICWA does not apply, it should reinstate the order terminating parental rights. (E.g., *In re Francisco W.* (2006) 139 Cal.App.4th 695, 711.) That disposition is not appropriate here, however, because, by the time our remittitur issues, P.M. will have turned 18.

The juvenile court may terminate its dependency jurisdiction after a dependent turns 18, but it has discretion to retain jurisdiction until a dependent turns 21. (Welf. & Inst. Code, § 303.) Moreover, while federal law defines an Indian child, in part, as a person under 18 (25 U.S.C. § 1903(4)), state law defines an Indian child so as to include persons aged 18 through 20. (Welfare and Institutions Code section 224.1, subd. (b).)

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[2] Available at <http://www.childsworld.ca.gov/res/pdf/cdsstribes.pdf>, as of September 12, 2014.

On remand, the juvenile court may consider terminating its jurisdiction immediately. (See Welf. & Inst. Code, § 391). If it does choose to terminate its jurisdiction, there will be no reason to give notice pursuant to ICWA, because there will be no pending "child custody proceeding" as defined by federal or state law.[3] Likewise, there will be no reason to reinstate the order terminating parental rights. The juvenile court has no authority to terminate the parental rights of a dependent who has turned 18. (See Welf. & Inst. Code, § 361.6, subd. (a) ["The nonminor dependent's legal status as an adult is, in and of itself, a compelling reason not to hold a hearing pursuant to Section 366.26."], 366.21, subd. (g)(4) ["[A] hearing pursuant to Section 366.26 shall not be ordered if the child is a nonminor dependent, unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan."], 366.26, subd. (b)(2) [juvenile court does not terminate parental rights when selecting plan of tribal customary adoption].) The whole point of terminating parental rights is to *free* the dependent for adoption. However, since an adult can be adopted regardless of parental rights (Fam. Code, § 9306, subd. (b)) or parental consent (Fam. Code, § 9302, subd. (b)), once P.M. turns 18 he can consent to maternal grandmother's adopting him.

In the event the juvenile court chooses to retain its jurisdiction, it must direct the Department to give notice of the proceedings in accordance with state law extending the

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3 Under both federal and state law, a "child custody proceeding" is defined as a proceeding for a foster care placement (including a placement in a guardianship or conservatorship), a preadoptive placement, an adoptive placement, or termination of parental rights. (25 U.S.C. § 1903(1); Welf. & Inst. Code, § 224.1, subd. (d).)

applicability of ICWA to a dependent aged 18 to 20. Once the juvenile court finds that there has been substantial compliance with the applicable notice requirements, it must determine whether P.M. is an Indian child under state law. Even if he is not, however, there will still be no reason to reinstate the order terminating parental rights.

III

DISPOSITION

The order appealed from is reversed and the matter is remanded. On remand, the juvenile court shall hold a hearing to decide whether it should terminate its jurisdiction immediately. If the juvenile court decides not to terminate its jurisdiction immediately, it shall direct the Department to give notice of the proceedings in accordance with state law extending the applicability of ICWA to a dependent aged 18 to 20. If the juvenile court finds that P.M. is not an Indian child within the meaning of Welfare and Institutions Code section 224.1, subdivision (b), then the juvenile court shall hold further proceedings not inconsistent with this opinion.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.